COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 48/CR/Jun09

In the matter between:

AEC Electronics (Pty) Ltd Applicant

And

The Department of Minerals and Energy Respondent

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member) and M Mokuena (Tribunal Member)

Heard on : 18 January 2010

Reasons issued on : 08 February 2010

Reasons for Decision

INTRODUCTION

[1] This is a complaint referral brought by the applicant, AEC Electronics (Pty) Ltd ("AECE"), after its complaint had been non–referred by the Competition Commission ('Commission'). When the matter came to us for hearing on the 18 January 2010, Tribunal, *mero motu* asked the parties to argue a point of law as to whether we had jurisdiction to hear a complaint of this nature, as the actions of the respondent in this matter concerned the exercise of public powers.[1] After hearing legal argument from the parties we have determined that we have no jurisdiction to hear this matter.[2] Our reasons for coming to this conclusion follow.

[2] AECE is a company engaged in the industry of supplying electronic equipment to the mining industry. It supplies inter alia cap lamps, shot exploders and blasting systems. These are all products for which safety

[1] We have this discretion in terms of sections 52(2) (b) and 55(1) of the Act.
[2] No evidence was led in the matter at the hearing and we only heard legal argument on the point of law raised by us.

standards are crucial. The DME is an organ of state which was established to oversee inter alia, the mining industry in the Republic. The DME's unit relevant in this matter is the Mine Health and Safety Unit. The mining industry is regulated, inter alia, by the Mine Health and Safety Act, No 29 of 1996 and the Mines and Works Act, No 27 of 1956 and the Occupational Health and Safety Act, No. 85 of 1993.

[3] AECE alleges that DME approval is required for it to sell these products to the industry and that such approval has not been forthcoming or in one case was given only temporarily, whilst approval has been given to rivals who have been able to enter the market. AECE attacks the basis on which the DME makes these decisions alleging that the decision making is inter alia, 'autocratic' and 'bizarre'. Additionally, the DME is accused of supplying information in a biased manner, constantly changing the 'goal posts' and not responding to correspondence for months at a time.

[4] As its relief, AECE asks the Tribunal to:

" .. investigate why the DME is approving other suppliers' equipment and not AECE's. It is also requested that approvals to other suppliers be revoked until such time that AECE equipment is also approved."[3]

[5] At the hearing AECE supplemented its relief and sought an alternative order from us, referring the matter back to the Commission for further investigation and possible action in terms of section 21(1) (a), (h) and (k) of the Competition Act ('Act').[4]

[6] The complaint referral follows a complaint which AECE had made to the Commission on 23 March 2009. After evaluating the complaint, the Commission decided to issue a certificate of non-referral and hence not to refer the matter to the Tribunal. The Commission explained that its reasons

[3] See complaint referral.

[4] See heads of argument of AECE paragraph 36-38. These sections provide for the Commission to "*implement measures to increase market transparency, negotiate agreements with any regulatory authority to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to insure the consistent application of the principles of the Act as well as to review legislation and public regulations, and to report to the Minister (of Trade and Industry) concerning any provision that permits uncompetitive behaviour".*

for this decision were based on what it was told by the DME's Head of Mine Safety (Technical Support), namely, Mr. Anthony Coutinho, that the department does not approve any products for use in mines but rather monitors the safety in mines and that approval of products is a function carried out by institutions like the South African Bureau of Standards ("SABS").

[7] Following the non-referral notice, AECE decided to refer the matter directly to the Tribunal on 28 May 2009 in terms of Section 51 (1) of the Competition Act. Whilst the factual allegations contained in the complaint and the complaint referral differ in certain respects, the essentials remain the same for the purpose of deciding the jurisdiction issue.

[8] Both the complaint and the complaint referral have been drafted by employees of AECE. This may account for the fact that the pleadings are not as coherent as they need to be to appreciate the nature of the complaint. For instance although the complaint referral contains a heading " *the respondent's abuse of its dominant position"* the referral neither indicates why the DME has a dominant position nor under which section of the Act it is said to have abused this allegedly dominant position. A similar observation can be made of the answer formulated by the DME, which again without the benefit of legal representation was not any clearer in its conception.[5]

[5] According to the DME's submission, approval of cap lamps was previously done in terms of the Minerals Act Regulations 15.5.1 and 15.5.2 of Schedule 4 of the Mine Health and Safety Act. In terms of these regulations, the Chief Inspector of Mines was empowered to issue out approval certificates to suppliers of cap lamps once the products complied with the requirements of SABS 1438 and SABS 086. These regulations were repealed and were replaced by new regulations, i.e. the Explosion Protection Apparatus ("EPA") Regulations. In terms of the EPA Regulations, accredited testing laboratories ("ATL's") are empowered to issue approval certificates provided that the requirements are met.

The DME submitted that the reason why AECE's cap lamps have not been approved for use in mines is that the proper procedure as outlined in the regulations was not followed. According to the DME, the procedure which AECE was supposed to follow is firstly supplying the products to the mines to be used for a specific trial period. During this period, the mine employees would compare the products with existing ones and fill out a report for each day the products are used. After the trial period, the supplier would then submit the results to the DME for evaluation.

AECE however, submits that is has been complying with all regulations as well as consulting several times with the DME and despite this, neither approval of its products nor reasons for this non-approval have been forthcoming.

[9] These shortcomings notwithstanding, we have decided to approach this case as a High Court would an exception, and make the assumption that the issues of fact alleged by AECE are correct and then decide whether it has made out a proper complaint for relief in terms of the Act.

[10] We will assume for the complainant the following facts are true: DME approval is required in order for AECE's products to be sold to the mining industry and that notwithstanding request, this approval has either been refused, unreasonably delayed or been given only for a temporary period inadequate for it to be able to enter the market competitively; that similar competing products manufactured by rivals have been approved by the DME and have been introduced in the market; that without the requisite permission AECE has been excluded from competing in the markets for these products.

[11] This summary suffices to test the point of law we have raised which was formulated as follows:[6]

[11.1] *Whether the Competition Act has any application to State Action such as that of the DME; and*

[11.2] *Whether it is competent for the Tribunal to grant the relief sought by the AECE in its Notice of Motion.*

[12] When the matter came before us for argument AECE was now represented by counsel. Counsel argued that the provisions of the Competition Act are applicable to conduct or actions on the part of the DME. The argument was premised on an expansive notion of what a 'firm' is for the purpose of the prohibited practice regime in the Act. The DME, it was argued, could be considered a firm. Its conduct in regulating the mining industry means that its actions will have an effect on that industry and hence for the purpose of section 3 of the Act, the application section, it engages in economic activity having an effect within the Republic. Of course one only contravenes the Act by committing a prohibited practice. We therefore asked counsel how the

[6] The point of law was sent in writing to the parties prior to the hearing to enable them to prepare.

DME's actions contravened the Act, since this was not clear from the referral. Counsel submitted that the prohibited practices relied upon were sections 8(b), section 8 (c) and in the alternative, section 8(d) (ii).

[13] These sections state that:

It is prohibited for a dominant firm to –

[13.1] *8(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*

[13.2] *8 (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act out-weighs its technological, efficiency or other pro-competitive gain; or*

[13.3] *8(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which out-weigh the anti-competitive effect of its act -*

.....
(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible.

[14] In order for a respondent to have contravened the section it must be a 'dominant firm', a requirement set out in section 7 of the Act. Section 7 states that a firm is dominant in a market if –

(a) It has at least 45% of that market;

(b) It has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or

(c) It has less that 35% of that market, but has market power.

[15] We asked counsel how the DME could be regarded as a 'firm' having a market share. Counsel conceded that it did not, but argued that it had market

power because of its regulatory power and thus, was susceptible to being treated as a dominant firm. Imaginative as this argument was, it makes no sense in the context of the section. A firm has market power by virtue of its power in a market in which it competes. Market power is defined as *"...the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitor, customers or suppliers."*

[16] It follows that section 7 applies to a firm that competes in a market by selling goods and services in that market and which has competitors, customers and suppliers, not an entity vested with state power that regulates a market. Note that the notion of the dominant firm selling "goods and services" finds repeated mention in section 8(d), whilst section 8(a) refers to 'price' and section 8(b) refers to access to an essential facility, and in the definition of the latter term, there is reference again to "*goods and services*".[7]

[17] But there is a further difficulty for AECE, which exposes the artificiality of its argument. In terms of section 6(1) of the Act, the Minister by notice in the Government Gazette sets a threshold turnover or asset size *"below which this Part [i.e. Part B the part dealing with an abuse of a dominant position] does not apply to a firm".* In other words not only must a firm have share of the relevant market for the purpose of section 7, it must have a turnover or hold assets over the gazetted threshold amount to qualify as a dominant firm in terms of section 7.

[18] It is clear that as a regulator, the DME neither has a turnover or assets nor a market share in a relevant market. It is thus not a firm either in terms of the ordinary meaning of the word or in terms of what a firm means for the purpose economics or of the Act, which in its prohibited practice regime has as its object the prevention of certain anticompetitive practices by firms who participate in markets not the review of the exercise of state power by state functionaries.[8]

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[7] An essential facility is defined as "*.an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*." Section 1(1)(viii) of the Act.

[8] The Oxford English Dictionary defines a firm as *"a company or business partnership"* The Oxford Dictionary of Accounting defines it as *"1. Any business organization. 2. A business partnership*." Black's Law Dictionary defines a firm as *"1.The title under which one or more persons conduct business jointly 2. The association by which persons are united for business purposes*."

[19] To escape this difficulty AECE argues that because the Act binds the State in terms of section 81 that when the Act refers to a 'firm' this does not exclude the State. Even if we accept that this is what the section may mean, it does seem to us that this applies when the State acts *qua* firm i.e. a State owned entity that is a firm that competes in a market by selling goods and services generating a turnover or acquiring assets. It does not mean that the State is always a firm for the purpose of the Act, but only when it behaves through a vehicle like a firm.[9]

[20] The interpretation that AECE advances by necessary implication elevates the Tribunal into a super regulator with powers to remedy the actions of other regulators. No such interpretation is authorised by the Act and indeed the fact that a regime is created for regulatory agreements between the Commission and other agencies to manage concurrent jurisdiction over competition matters, suggests that regulators are equal to and not subordinate to one another unless specifically provided for otherwise.[10]

[21] We neither have the competence to instruct a state functionary exercising a public power to act in a particular manner or to desist from acting in a particular manner. As such they are not susceptible to our jurisdiction and the proper course would have been to proceed with an administrative law case to the High Court to review the DME. The complaints about the DME relate to the manner in which it has exercised its discretion as a regulator - bias, arbitrariness etc., all of which are typically the matters considered in High Court administrative reviews. The business of the Competition Act is the wrongful exercise of market power a matter over which the Tribunal has jurisdiction. The business of administrative law is the wrongful exercise of public power a matter over which the Tribunal has no jurisdiction.

[22] There is also no purpose in granting AECE's alternative prayer to refer the matter back to the Commission for further investigation. No further investigation will turn an administrative law case into a competition case.

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[9] Note that there are no doubt other more technical reasons for this section's inclusion which we do not need to consider here. It suffices to say that the section does not suffuse a regulator with the quality we associate with a firm.

[10] See section 3(1A) which deals with concurrent jurisdiction read with section 82(1) See as well section 21(1)h).

[23] We find that we have no jurisdiction to hear this matter. The action is dismissed.

COSTS

[24] In matters between a private complainant and a respondent we are entitled to make a costs award. In this case the DME has not sought costs as it has relied on its in-house personnel to run the case. No cost award is made.

N Manoim **08 February 2010**
Date

Y Carrim and M Mokuena concurring.

Tribunal Researcher : I Selaledi

For the Applicant : Adv C J van der Westhuizen SC instructed by Dr. Gerntholtz Inc.

For the Respondent : S. Ramabulana and A. Coutinho of the DME